

**United States Department of Labor
Employees' Compensation Appeals Board**

D.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Duluth, GA, Employer**

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**Docket No. 07-112
Issued: March 13, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 16, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated July 13, 2006, which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the most recent merit decision dated April 3, 2001 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly declined a request for reconsideration under section 8128(a) of the Federal Employees Compensation Act on the grounds that it was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On April 4, 2000 appellant, then a distribution clerk, filed an occupational disease claim alleging pain in her neck and shoulders beginning in 1996, which she attributed to excessive

walking and repetitive writing in the performance of duty. She first related her condition to her employment on December 13, 1999. The Office denied her claim on July 7, 2000 finding that she had not submitted sufficient medical evidence to establish a causal relationship between her implicated employment duties and any diagnosed condition.

Appellant requested an oral hearing on August 3, 2000. She testified at the December 26, 2000 oral hearing and addressed her alleged conditions of chronic pain in the neck and lower back as well as bilateral patella spurs. Appellant implicated employment duties of walking, bending, stooping, pushing and reaching above her head. By decision dated April 3, 2001, the hearing representative denied appellant's claim finding that there was no sufficient medical evidence to establish a causal relationship between her alleged neck, back and knee conditions and her employment duties.

Appellant requested reconsideration on April 25, 2006 and submitted diagnostic testing related to her back and knees, as well as emergency room notes regarding a fall on June 3, 2001. She also submitted information regarding letter sorting machines and employing establishment container descriptions.

By decision dated July 13, 2006, the Office declined to reopen appellant's claim for consideration of the merits finding that her request for reconsideration was not timely filed and did not establish clear evidence of error on the part of the Office.

LEGAL PRECEDENT

Section 8128(a) of the Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

³ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁴ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

The Office's regulations require that an application for reconsideration must be submitted in writing⁶ and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."⁷ The regulations provide:

"[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."⁸

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹⁵ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁶

⁶ 20 C.F.R. § 10.606.

⁷ *Id.* at § 10.605.

⁸ *Id.* at § 10.607(b).

⁹ *Thankamma Mathews*, *supra* note 2 at 770.

¹⁰ *Id.*

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Jesus D. Sanchez*, *supra* note 3 at 968.

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁶ *Gregory Griffin*, *supra* note 14 at 458, 466.

Appellant filed her request for reconsideration on April 26, 2005, five years after the April 3, 2001 decision. It was untimely made.

ANALYSIS

The underlying issue in this claim is whether appellant has established a causal relationship between her alleged neck, back and knee conditions and her employment duties. The evidence that appellant submitted in support of her April 25, 2006 request for reconsideration did not address this issue. The medical evidence addressed a fall at work on June 3, 2001 rather than her condition on or after 1996. The Office accepted that appellant's employment required walking, bending, stooping, pushing and reaching above her head. Therefore, the evidence that appellant submitted regarding her duties as a letter sorting machine clerk and the size and assortment of employing establishment containers is not relevant to the underlying issue of her claim. She did not submit any medical evidence regarding her claim. The diagnostic studies are not relevant as they do not provide any opinion on the causal relationship between her work duties and her diagnosed neck, back and knee conditions. As there is no relevant evidence in support of appellant's request for reconsideration, appellant has not established clear evidence of error. The Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that appellant failed to submit any relevant evidence in support of her request for reconsideration and that the Office properly declined to reopen her untimely request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board